

## Statement of Commissioner Kevin J. Martin and Commissioner Michael J. Copps

*Re: National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, CSR-5865-Z (Media Bureau, April 4, 2002)*

In 1999, Congress passed the Satellite Home Viewer Improvement Act (“SHVIA”). SHVIA allowed satellite carriers to carry local broadcast signals, but required that if a provider carries *any* local broadcast signals, it must carry *all* local broadcast signals. Moreover, Congress required that satellite carriers provide subscribers with access to those local broadcast signals at a nondiscriminatory price and in a nondiscriminatory manner.

The Media Bureau recently determined that EchoStar’s “two-dish plan” failed to provide consumers with access to local broadcast signals at a nondiscriminatory price or in a nondiscriminatory manner, and failed to place these signals on contiguous channels.<sup>1</sup> We wholeheartedly agree with the *Bureau Order’s* conclusion that the two-dish plan therefore violated the nondiscrimination provision of SHVIA and § 76.66(i) of the Commission’s rules.<sup>2</sup>

Unfortunately, and puzzlingly, the *Bureau Order* did not stop there. The *Bureau Order* went on to propose several “options” regarding how EchoStar could remedy the statutory and rule violations. For instance, as discussed below, the *Bureau Order* states EchoStar could continue its two-dish plan merely by providing “[i]mmediate and direct communication” to its subscribers regarding the second dish option.

We find it implausible that EchoStar’s two-dish policy would be permissible, and the above violations remedied, if EchoStar merely provides consumers with better notice of its discriminatory actions and the steps the consumer must take to alleviate the differential treatment. Such a “remedy” does not ensure consumers have access to all local broadcast stations a nondiscriminatory manner, but rather makes some stations unavailable to consumers as a practical matter. Indeed, unless individual consumers take the time to read or listen to the “communication,” actually request the second dish, and then take the time off work to wait for the dish to arrive and to have it installed, those consumers certainly will not have access to the broadcast channels EchoStar chooses to provide only through the second dish.

We do not see how this remedy is consistent with the nondiscrimination requirement in §338(d), the Commission’s implementing rule, or even the *Bureau Order’s* own findings that such steps impose a discriminatory cost on certain local broadcast channels. Such a “remedy” effectively eviscerates the finding that EchoStar’s current policy is unlawful. We fear that the *Bureau Order* will allow EchoStar to continue its two-dish policy – albeit with better notice – in a manner that continues to make some local broadcast signals inaccessible to consumers as a practical matter.

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<sup>1</sup> *National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, CSR-5865-Z (Media Bureau, April 4, 2002) (“Bureau Order”) at ¶ 2.*

<sup>2</sup> *See id.* See also 47 U.S.C. § 338(d); 47 C.F.R. § 76.66(i).

## “Carry One, Carry All” Requirement

SHVIA amended the copyright laws to greatly facilitate satellite carriers’ ability to offer their subscribers access to the local broadcast signals.<sup>3</sup> In exchange, Congress required that satellite carriers that carry *any* local broadcast signals must carry *all* local broadcast signals.<sup>4</sup> This “carry one, carry all” requirement was intended to prevent satellite carriers from choosing to carry only the most popular broadcast stations and “effectively preventing many other local broadcasters from reaching potential viewers in their service areas.”<sup>5</sup> Underlying the “carry one, carry all” obligation is SHVIA’s nondiscrimination requirement, incorporated into § 338(d) of the Communications Act of 1934, as amended. Section 338(d) provides that:

the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations’ local market on contiguous channels and provide access to such station’s signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.<sup>6</sup>

In November of 2000, the Commission issued a Report and Order implementing the broadcast signal carriage provisions of SHVIA, including the above nondiscrimination provision.<sup>7</sup> Parties had asked the Commission to interpret this provision as prohibiting satellite carriers from requiring subscribers to obtain new equipment to access some, but not all of the local signals in a market. The Commission found that:

the language of Section 338(d) covers the additional equipment concerns raised by the parties and bars satellite carriers from requiring subscribers to purchase additional equipment [*e.g.*, a satellite dish] when television stations from one market are segregated and carried on separate satellites. However, we are not prohibiting a satellite carrier from requiring a subscriber to pay for an additional dish in order to receive *all* television stations from a single market. For example, DirecTV may require an additional dish to receive *all* television stations from the Baltimore market, but it may not require subscribers to purchase the same to receive *some* Baltimore stations where the others are available using existing equipment.<sup>8</sup>

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<sup>3</sup> See 17 U.S.C. § 122(a).

<sup>4</sup> See 47 U.S.C. § 338(a).

<sup>5</sup> Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106<sup>th</sup> Cong., H.R. Conf. Rep. No. 106-464, at 101 (1999).

<sup>6</sup> 47 U.S.C. § 338(d).

<sup>7</sup> See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Report and Order, 16 FCC Rcd 1918 (2000) (“*Report and Order*”).

<sup>8</sup> *Id.* at 16 FCC Rcd 1961 (emphasis added).

The Commission therefore promulgated the following rule prohibiting a satellite carrier from requiring subscribers to obtain additional equipment at their own expense in order to access some, but not all, local television broadcast stations:

Within a market, no satellite carrier shall provide local-into-local service in a manner that requires subscribers to obtain additional equipment at their own expense or for an additional carrier charge in order to obtain one or more local television broadcast signals if such equipment is not required for the receipt of other local television broadcast signals.<sup>9</sup>

DIRECTV petitioned the Commission to reconsider its interpretation of the nondiscrimination provision.<sup>10</sup> DIRECTV sought a broader finding that satellite carriers could provide local broadcast signals from two different satellite dishes without violating § 338(d). Specifically, DIRECTV contended that § 338(d) “does not prohibit satellite carriers from offering local-into-local services from multiple locations, with multiple dishes if necessary, where it makes business and technical sense to do so.”<sup>11</sup>

The Commission rejected this argument in the *Order on Reconsideration* released last September.<sup>12</sup> Indeed, the Commission determined that:

a limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without a separate dish is necessary to give full effect to local station carriage requirements.<sup>13</sup>

The Commission continued to explain that:

Otherwise ... satellite carriers could structure local station packages and separate dish requirements to discourage consumers from subscribing to certain local stations, including local noncommercial stations.<sup>14</sup>

Indeed, the *Bureau Order* yesterday expressly re-affirmed these conclusions.<sup>15</sup>

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<sup>9</sup> See 47 C.F.R. § 76.66 (i)(4).

<sup>10</sup> See DIRECTV Petition for Reconsideration at 19-23 (filed Feb. 22, 2001). DIRECTV’s Petition requested reconsideration of other aspects of our original *Report and Order*, as well; those arguments are not relevant here.

<sup>11</sup> [*Id.* at 23.]

<sup>12</sup> See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd 16544, 16565-16566 (2001) (“*Order on Reconsideration*”).

<sup>13</sup> *Id.* at 16566.

<sup>14</sup> *Id.*

<sup>15</sup> See *Bureau Order* at ¶ 5 (quoting the *Order on Reconsideration*, 16 FCC Rcd at 16566).

## EchoStar's Two-Dish Policy and the *Bureau Order*

When the “carry one, carry all” obligation became effective this past January, EchoStar implemented a “two-dish plan.” It placed some local broadcast signals on a second dish, but did not charge subscribers an additional fee for obtaining that second dish.

The *Bureau Order* yesterday determined that, as implemented, EchoStar’s policy violated both the Communications Act and the Commission’s rules.<sup>16</sup> The *Bureau Order* found that EchoStar committed three separate violations. First, EchoStar was “providing access to certain stations at a discriminatory price.”<sup>17</sup> Second, EchoStar was not “retransmit[ing] the signal of local television broadcast stations to subscribers on contiguous channels.”<sup>18</sup> Third, EchoStar was not “providing access to local television broadcast station signals in a nondiscriminatory manner on its on-screen program guide or menu.”<sup>19</sup>

With respect to the finding of price discrimination, the *Bureau Order* found that EchoStar effectively required subscribers to obtain the second dish “at their own expense,” even if that expense was not in the form of a price tag on the equipment. As the *Bureau Order* explained:

From the subscriber’s point of view, the costs of obtaining the “free” dish under EchoStar’s implementation of its two-dish plan include the time, trouble, and inconvenience to the subscriber to obtain the information concerning the need for the second dish, the procedures for arranging to get the second dish (including overcoming any misinformation), plus the time spent waiting for the second dish to be installed.... As such, EchoStar’s two-dish plan results in discrimination based on price of the type Congress and the Commission intended to prohibit.

In effect, the *Bureau Order* found that, as implemented, EchoStar’s two-dish policy placed a burden on the consumer to arrange to get the second dish and to wait to have the dish installed. This burden constituted an increased “cost” to the consumer to access certain local stations in violation of SHVIA’s nondiscriminatory price requirement. We agree with this conclusion.

Similarly, the *Bureau Order* concluded that “EchoStar’s manner of carriage for certain local stations is discriminatory in terms of access to such stations on the on-screen program guide and menu.”<sup>20</sup> The *Bureau Order* found that:

EchoStar’s on-screen electronic program guide unlawfully discriminates against “disfavored” local signals because those

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<sup>16</sup> *Id.* at ¶ 2 (citing 47 U.S.C. § 338(d) and 47 C.F.R. § 76.66(i)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at ¶ 27.

stations do not appear on the program guide unless and until a second dish is obtained and installed.... Thus, subscribers attempting to tune to all the local stations that they have paid for as part of a package will be unable to find certain local stations in some markets.<sup>21</sup>

Thus, the *Bureau Order* also found that EchoStar was unlawfully discriminating against “disfavored” local signals because subscribers could not access all of the local signals until a second dish was obtained and installed, again violating § 338(d). We agree with this conclusion, as well.

### **The Bureau Order’s Remedy “Options”**

Having found that EchoStar’s two-dish plan as implemented violated both Congressional statute and Commission rules, the *Bureau Order* proceeded to establish remedy options that EchoStar could take in order to prevent the “unlawful discrimination” that has taken place.<sup>22</sup> Several options – each of which is independent of the other – would result in consumers continuing to be unable to access all of their local signals, in violation of SHVIA, Commission rules, Commission language contained in the *Report and Order* and the *Order on Reconsideration*, and even the findings as to what constitutes “discrimination” that the *Bureau Order* made earlier in very same document.

For example, the *Bureau Order* concludes that “one approach” that EchoStar could take to come into compliance with SHVIA and Commission rules and “address the unlawful discriminatory actions” would be to undertake:

[i]mmediate and direct communication with all affected local-into-local subscribers that they are not receiving all the local stations for which they are paying unless EchoStar has installed the necessary additional equipment, and that EchoStar will provide the necessary equipment free of any charge.<sup>23</sup>

We do not see how better notice of EchoStar’s 2-dish plan remedies the findings of unlawfulness—price discrimination, non-contiguous channel placement, and lack of access to signals in a nondiscriminatory manner.<sup>24</sup>

With respect to price discrimination, the *Bureau Order* found that the “costs of obtaining the ‘free’ dish” had included three aspects: (1) obtaining the information that a second dish was needed, (2) arranging to receive the second dish, and (3) waiting for the second dish to be installed. Notice might mitigate the first factor, if subscribers bother to read or listen to the “communication” EchoStar transmits to them. Yet it does nothing to rectify the remaining steps,

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<sup>21</sup> *Id.* at ¶ 28.

<sup>22</sup> *Id.* at ¶ 32-33.

<sup>23</sup> *Id.* at ¶ 32.

<sup>24</sup> *See id.* at ¶ 2.

which most subscribers might consider the more “costly aspects” since they likely require taking time off from work to wait for the dish to arrive and be installed. Even more fundamentally, we were not aware that effective notice of price discrimination would be considered an effective remedy for that same discrimination which was just found to have violated a statute. And we see no caveat in the statute that indicates that satellite carriers must provide access to broadcast station’s signals at a nondiscriminatory price ... unless customers know the prices are discriminatory. Indeed, if that were the case, EchoStar could charge additional fees on a per-channel basis so long as adequate notice was provided. We do not believe that mere notice of any price discrimination is what Congress intended by a requirement that satellite carriers “carry one, carry all” local broadcast signals at a nondiscriminatory price.

Similarly, with respect to the findings that EchoStar’s 2-dish plan “as implemented” also violated the statute’s contiguous channel placement and nondiscriminatory access through the EPG requirements, we fail to see how notice addresses these violations either.

Finally, we question whether the Bureau had the authority to make such decisions as to permissible remedies. The Bureau cannot propose compliance measures that leave in place conduct that violates express statutory requirements, violates Commission rules, and is inconsistent with Commission language in the Order on Reconsideration.

As specified in our rules, the Bureau has only that authority delegated to it. Section 0.283 expressly prohibits the Bureau from deciding “matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”<sup>25</sup> It is clear to us that several of the Bureau’s remedy options are inconsistent with “existing precedent and guidelines.” The Commission stated in the *Order on Reconsideration* that a “limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without a separate dish is necessary to give full effect to local station carriage requirements.”<sup>26</sup> As the Bureau’s proposed remedy appears to violate the statute and expressly contradicts Commission language, it can not be implemented on delegated authority by the Bureau.

Indeed, the language in the Commission’s order implies that EchoStar’s policy of requiring subscribers to obtain a second dish to obtain some local signals may *never* be consistent with SHVIA. We do not prejudge here, however, whether the Commission could permit a “two dish plan” in the context of the “carry one, carry all” requirements that would be implemented in a non-discriminatory fashion consistent with the statute and the Commission’s rules. That issue is ambiguous. But even if ambiguous, it would be a novel issue, and thus the Bureau could not resolve it on delegated authority.

There is nothing in the Commission’s *Order*, the *Order on Reconsideration*, or the implementing regulations that says satellite carriers may require subscribers to obtain a second dish to obtain some, but not all, local broadcast signals without violating § 338(d). Certainly the Commission has never discussed exactly how such a policy could be non-discriminatory. The *Bureau Order’s* discussion of the specific circumstances under which such a 2-dish policy would

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<sup>25</sup> 47 C.F.R. §0.283(c).

<sup>26</sup> *Order on Reconsideration*, 16 FCC Rcd at 16566.

be permissible, therefore, is without precedent and thus beyond the scope of the Bureau's authority. And the Commission has issued no "precedent or guidelines" regarding how notice of discriminatory conduct—no matter how prominent—could condone that conduct. Again, that is a novel question of law.

Finally, the *Bureau Order* includes a discussion of EchoStar's ability to seek a waiver.<sup>27</sup> This paragraph is, at best, confusing. First, the *Bureau Order* states that "EchoStar may seek a short-term waiver rather than terminate service in a market it is currently serving with local-into-local service."<sup>28</sup> A waiver of what? Of the nondiscriminatory pricing requirement? No, because, as the *Bureau Order* notes, it "cannot consider or grant a waiver insofar as EchoStar's actions directly violate the statute."<sup>29</sup> Of the nondiscriminatory program guide treatment requirement? No, because, again, that is in the statute. Of the preceding remedy "options"? No, because the *Bureau Order* notes that EchoStar could remedy its violations by choosing "some or all of these approaches."<sup>30</sup> That leaves only our one rule on point: § 76.66 (i)(4). Yet how could we waive this prohibition on "requir[ing] subscribers to obtain additional equipment at their own expense ... in order to obtain one or more local television broadcast signals" without *also* waiving the statutory obligation to "provide access to such station's signals at a nondiscriminatory price"?

## **Conclusion**

In passing SHVIA, Congress ensured that a satellite carrier choosing to offer *any* local broadcaster would be required to carry *all* local stations in a nondiscriminatory fashion. The *Bureau Order* found that EchoStar's actions discriminated against some signals, in violation of the statutory nondiscrimination requirement. Yet the *Bureau Order* also found that more effective notice of this discrimination would be sufficient to remedy EchoStar's actions and bring its two-dish plan into compliance. We believe the nondiscrimination requirements of the statute, Congressional intent, and Commission rules all demand more. But perhaps even more importantly, DBS consumers deserve more.

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<sup>27</sup> See *Bureau Order* at ¶ 34.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at ¶ 31.